IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.153 OF 1993

Shri. Devchand K. Tandel ...Applicant

Vs.

Shri. H.D. Parekh & Othrs. ...Respondents

Shri. R.V. Desai, Senior advocate with Shri. Avinash D. Kango for the Applicant.

Shri. D.T. Palekar for the Respondent Nos.1 and 2.

Shri. J.C. Satpute, Senior advocate for the Respondent No.3.

CORAM : A. S. OKA, J.
DATE : SEPTEMBER 01, 2005.

JUDGMENT:

1. The submissions of the learned Counsel appearing for the parties were fully heard on the last date and today the Revision Application is kept for dictation of judgment.

2. The Revision Application is filed by the original accused. The Applicant has been convicted for the offence punishable under section 135(1)(i) of the Customs Act, 1964 (hereinafter referred to as the Customs Act). The learned Judicial Magistrate, First Class, Daman convicted the Applicant and sentenced him to suffer rigorous imprisonment for one year and to pay a fine of Rs.3,000/-. In default in payment of fine, the learned Judicial Magistrate directed the Applicant to suffer rigorous imprisonment for three

months. In an Appeal preferred by the Applicant, the conviction and sentence has been confirmed by the learned District and Sessions Judge at Daman.

3. Before referring to the detailed submissions made by the counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The case of the prosecution is that on receiving reliable information, the Assistant Collector of Customs searched the premises of the Applicant on 14th November, 1983 situated at Nani Daman. The allegation is that on seeing the Officers of the Customs Department, the Applicant ran away. When the Officers of the Customs Department proceeded to search the premises of the Applicant one Bhudiben, mother of the Applicant was present. The allegation is that in the compound of the house, a concealed cavity below the iron water tank was found. In the said cavity, certain packages wrapped in paper and plastic were found. The case of the prosecution is the packages contained seven video cassette recorders of Japan make. The said video cassette recorders were seized under a panchnama on the basis of the reasonable belief that the video cassette recorders were smuggled and were liable for confiscation under section 111 of the Customs Act. The valuation of the

goods was made at Rs.01,41,000/-.

4. A statement of the Applicant's mother Bhudiben was recorded under section 108 of the Customs Act. The case of the prosecution is that she attributed the knowledge of the seized goods to the Applicant. The allegation is that despite several efforts presence of the Applicant could not be secured. The order was made on 29th October, 1984 by the Additional Collector of Customs, Ahemdabad for confiscating video cassette recorders. A penalty in the sum of Rs.50,000/- was imposed on the Applicant under the said order. The case of the prosecution is that the import of the said goods was prohibited as an order dated 07th December, 1955 was issued under section 3 of the Import and Export (Control) Act, 1947. The case of the prosecution is that by virtue of the said order, there is a deemed prohibition under section 11 of the Customs Act in view of the provisions of the Section 3(1) of the Import and Export (Control) Act, 1947 (hereinafter referred to as the said Act of 1947). The prosecution case is that the goods seized from the residential premises of the Applicant were not covered by any clearance, permit or import licence and therefore, the Applicant was liable to be proecuted an punished under section 135 of the Customs Act, 1962.

5. The prosecution examined about twelve witnesses. One of the witnesses Shri. D.M. Patel expired after evidence before the charge was recorded and was not available for cross-examination after framing of the charge. Apart from other defences, the main defence appears to be that the prosecution has failed to prove that the goods were in conscious or exclusive possession of the Applicant. The other defence of the Applicant is that there is no notification issued as contemplated under sub section 2 of section 123 of the Customs Act as regards the said goods. Another contention is based on the fact that the witness Shri.D.M.Patel was not available for cross-examination and therefore, his evidence cannot be considered.

6. Shri. Desai, the learned Senior Counsel appearing for the Applicant has made various submissions. His first contention is that there is no evidence on record to show that the articles were found in conscious possession of the Applicant. He relied upon various decisions of the Supreme Court. He invited my attention to the judgment and order dated 19th October, 1993 passed by the Customs, Excise, Gold (Control) Appellate Tribunal (hereinafter

referred to as CEGAT) and submitted that order of conviction will have to be quashed. He submitted that CEGAT has recorded a finding that exclusive possession of the Applicant of the area in which goods were found was not established and therefore, penalty imposed on the Applicant was set aside. He invited my attention to the fact that an order of preventive detention under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the said Act of 1974) was passed against the Applicant. He relied upon a judgment of Division Bench of this High Court on 02nd July, 1985 by which the order of detention was set aside on the ground that the goods were not notified and on the date of seizure, there was no notification issued under sub section (2) of section 123 of the Customs Act. He, therefore, submitted that on the basis of subsequent orders passed by the CEGAT and this court, the conviction deserves to be set aside. He submitted that the Applicant had no opportunity to cross-examine P.W.1 D. H. Patel who died after his evidence before framing of charge was recorded. He submitted that at that stage, the Applicant was not bound to cross-examine the said witness and as no opportunity was available to the Applicant to cross-examine the said witness, his evidence will have

to be ignored. He submitted that as the said evidence will have to be ignored, the seizure is not proved. He submitted that statement under section 108 of the Customs Act of the mother of the Applicant could not have been relied upon. He lastly submitted that even assuming that offence is established, the conviction could not have been under clause (i) of sub section (1) of Section 135 in as much as when the offence was allegedly committed, admittedly, there was no notification issued under sub section (2) of section 123 of the Customs Act notifying the goods in question. He, therefore, submitted that the provision relating to minimum punishment was not applicable. He submitted that after long lapse of time, the Applicant cannot be made to undergo imprisonment. He submitted that as of today, the alleged offence does not have any significance. I am referring to various decisions relied to by Mr. Desai in later part of the judgment.

7. Shri. Palekar appering for the Respondent Nos.1 and 2 has supported the impugned Judgments and Orders. He submitted that though the notification under sub section (2) of section 123 was issued subsequent to the seizure of the goods, the provision of section 123 being a procedural provision will apply retrospectively. He submitted that subsequent

decision of the CEGAT has no bearing on the conviction and finding recorded by CEGAT which is a tribunal will not bind criminal court and the finding by the CEGAT is not conclusive. He submitted that the Applicant cannot derive any help from the judgment delivered by the Goa Bench of this Court as the said judgment relates to an order of preventing detention passed against the Applicant and the scope of inquiry in the said Petition was totally different. He submitted that evidence of P.W.1 Shri. Patel will have to be read in evidence as inspite of an opportunity being available, the Applicant has not choosen to cross-examine him. He has referred to some of the decisions of the Apex Court. I have dealt with the said decisions in the later part of the judgment. The learned Counsel appearing for the Respondent No.3 has also supported the submissions made by the learned Counsel appearing for the Respondent Nos.1 and 2.

8. I have considered the submissions. It must be noted that a Revision Application cannot be equated with a regular appeal against order of conviction. Scope of the Revision Application is limited in the sense that while deciding Revision Application, this Court cannot re-appriciate the evidence. Only if there is manifest illegality or procedural

irregularity, this court can interfere. This Court can also interfere when material piece of evidence is ignored by the courts below or where evidence which is inadmissible is made the basis of the conviction.

9. Therefore, it will be necessary to refer to the findings recorded by the Trial Court as well as the Appellate Court on the factual aspects. The learned Magistrate has held that apart from the evidence of P.W.1 Shri. Patel, there is evidence of P.W.11 B.C. Parmar, Inspector of Customs (Preventive), Bulsar and P.W.12 B.K.Soroya, Inspector of Customs, Daman on the material particulars of the search and seizure of the goods and the said evidence was consistent. It is to be noted here that the learned Magistrate has referred to evidence of all material witnesses and has considered and appreciated the entire oral and documentary evidence on record. There is a finding of fact recorded that testimony of P.W. Nos.9, 11 and 12 on the search and seizure is very consistent and the said evidence inspires confidence. P.W.9 P.V. Chavda who is an Intelligence Officer has deposed in support of the prosecution case regarding search and seizure. He has deposed regarding discovery of seven video cassette recorders from the cavity below water tank. Evidence of Shri.

B.C. Parmar, P.W.11 also supports the prosecution in so far as search and seizure is concerned. He has stated that he saw the Applicant fleeing from the rare door and he was having something in hand.

10. The Appellate Court has given reasons for coming to the conclusion as to why statement of P.W.1 was admissible in evidence. The learned Sessions Judge has adverted himself to the minor discrepency in the description of premises which was allegedly committed by the Inspectors of the Customs Department. Relying upon the decisions of the Supreme Court, the learned Sessions Judge came to the conclusion that the statement under section 108 of the Customs Act is admissible as a Custom Officer is not a Police Officer and the person against whom inquiry is being made under sections 107 and 108 is not an accused person. The learned Sessions Judge, therefore, came to the conclusion that there is no difficulty in holding that the statement of the accused-Applicant recorded under section 108 of the Customs Act at Exh.2/A was relevant and it corroborates search and seizure of the contravened goods.

11. Thus, there are clear and cogent findings recorded by Courts below as regards possession of the

Applicant of contravened articles. Even if evidenc of P.W.1 Mr.Patel is to be ignored, it is very difficult to find fault with the findings recorded by the courts below on the factual aspect regarding conscious possession of the Applicant of the contravened goods. Therefore, as far as findings of fact on this aspect are concerned, it is very difficult to interfere with the same.

12. As stated earlier Shri. Desai, learned Counsel relied upon decision of CEGAT dated 19th October, 1993 and submitted that as it is held by CEGAT that exclusive possession of the Applicant is not established, the conviction of the Applicant will have to be over turned. He has placed reliance on the decision of the Apex Court reported in I.T.R. Vol. 265 Page 562 (K.C. Builders and Anr. Vs. Assistant Commissioner of Income Tax). This was a case where under the provisions of the Income Tax Act, 1961, penalty for concealment of the income tax was awarded on the basis of the additions made in the assessment order. The Appellate Tribunal came to the conclusion that there was no concealment of income and therefore, order of penalty under section 271(1)(c) of the said Act of 1961 was set aside. The Apex Court held that the matter which has been adjudicated upon and finally

settled by the Tribunal need not be dragged into criminal courts unless the act of the assessee can be described as culpable. The Apex Court held that quashing of prosecution for an offence under section 276-C must follow as the finding of the Appellate Autority was conclusive so far as concealment is concerned. The Apex Court, therefore, held that once order of penalty is set aside on the ground that there is no concealment of income, the prosecution has to be quashed automatically. He has also placed reliance on decision of Madras High Court in the case reported in I.T.R. Vol.233 Page 294 (Kothari & Sons (Industries) Pvt. Ltd. & Ors. Vs. M. V. Subramaniam). He has also pressed into service the decision of the Apex Court reported in AIR 1992 Supreme Court 1831 (K.T.M.S. Mohd. & Anr. Vs. Union of India). It will be also necessary to refer to decision of the learned Single Judge of this Court reported in 1998 (6) L.J. 394 (Ramniklal Premchand Mehta Vs. Union of India & Ors). This court held that against the order of confiscation, the Tribunal accepted the case of the accused and therefore, the prosecution will have to be quashed. Another learned Single Judge of this court in a decision reported in 1996 Criminal Law Journal 449 held that when the orders of penalty on account of concealment of income was quashed by the final

authority of the Income-tax Act, continuation of the criminal proceedings thereafter for offence of concealment of income-tax is not permissible and the accused can be discharged. In the case of the J.L.Gidwani Vs. I.T.O. and another reported in Volume 224 ITR Page 687 , similar view has been taken by the Apex Court regarding quashing of the prosectuion where the alleged false statement in the return was later on accepted as genuine.

13. The learned counsel appearing for the Applicant has also invited my attention to the decision of the larger bench of the Apex Court reported in Vol.149, I.T.R. 696 (P. Jayappan Vs S. K. Perumal, First I.T. Officer). In the facts of the case before the Apex Court, the Petitioner was a Proprietor of a firm which was an assesse under the Income-tax Act. It was alleged that a search was coducted in the premises of the Petitioner where a seizure of several documents made. It was alleged that there were several wrong statements made in the accounts and the allegation was made that he has deliberately filed false return and has kept false accounts with intention to use them as genuine evidence in assessment proceedings. Complaints were also filed in the court of Magistrate for taking

action against the Petitioner for the offence punishable under section 276 of the Income-tax Act and Section 196 of the Indian Penal Code. It was alleged that the Petitioner had deliberately filed a false return and had kept false accounts with the intention of using them as evidence in assessment proceedings. The Petitions for quashing under section 482 of the Code of Criminal Proecudure, 1973 were filed on the ground that re-assessment proceedings were intitiated. After referring to its own decision in Uttam singh case, the Apex Court held as under :

> "It is true that, as observed by this court in Uttam Chand V. ITO (1982) 133 ITR 909, the prosecution once initiated may be quashed in the light of a finding favourable to the assessee recorded an authority under the Act subsequently in respect of the relevant assessment proceedings but that decision is no authority for the proposition that no proceedings can be intitiated at all under s.276C and s.277 as along assome proceeding under the Act in which there is a chance of success of the assessee is pending. A mere expectation of success in some proceeding in appeal or reference under the Act cannot come in the way of the institution of the criminal proceedings under s. 276C and s.277 of the Act. **In the criminal case all the ingredients of the offence in question have to be established in order to secure the conviction of the accused. The criminal court no doubt has to give due regard to the result of any proceeding under the Act having a bearing on the question in issue and in an appropriate case it may drop the proceedings in the**

> **light of an order passed under the Act. It does not, however, mean that the result of a proceeding under the Act would be binding on the criminal court. The criminal court has to judge the case independently on the evidence placed before it. Otherwise, there is a danger of a contention being advanced that whenever an assessee or any other person liable under the Act had failed to convince the authorities in the proceedings under the Act that he has not deliberately made any false statement or that he has not fabricated any material evidence, the conviction of such person should invariably follow in the criminal court."**(Emphasis supplied)

In the light of the law laid down by the Apex Court in the aforesaid decision, the case of the Applicant will have to be examined. It must be borne in mind that in the cases relied upon by the Applicant including the case of K.C. Builders and Anr., the Apex Court and this court was dealing with the issue of quashing pending Criminal proceedings. This court in the present Revision Application is concerned with an order of conviction rendered at the conclusion of the trial. It is to be noted that when the order of conviction was passed and when later on it was confirmed, there was no finding in favour of the Applicant recorded by the Tribunal or the Authority under the Customs Act. On the basis of evidence which was led by the prosecution, factual findings are recorded by the court of the Magistrate and a finding

of guilt has been concurrently recorded by the courts below. The question is whether that those findings which are supported by oral and documentary evidence on record are nullified by a subsequent decision of the CGAT quashing the penalty imposed on the Applicant. It must be borne in mind that even in the case of K.C. Builders and the case of P. Jayappan, the Apex Court was dealing with the power of the court of quashing the pending prosecution under section 482 of the Code of Criminal Procedure, 1973 and under provisions of Constitution of India. It will not be out of place here to mention that order of quashing prosecution could have been passed under section 482 of the said Code of 1973 or under Articles 226 and 227 of the Constitution of India under various circumstances. Even in a case where ingredients of an offence are prima facie established, considering the peculiar factual situation, the High Courts are empowered to quash the prosecution. In the present Application what is to be considered is effect of subsequent adjudication of the Tribunal on order of conviction based on the evidence on record. By no stretch of imagination, the Apex Court has laid down that findings of a tribunal in adjudication proceedings are binding on the criminal court. In fact, the scope of both the proceedings is totally

different. Question of dropping or quashing the pending prosecution in appropirate cases having due regard to the decision in adjudication proceedings is totally different from question of setting aside conviction already made on the basis of subsequent adjudication made by the Tribunal. The Apex Court in the case of P. Jayappan has in so many words held that result of the proceeding under the Income tax Act cannot be said to be binding on the criminal court and the criminal court has to judge the case independently on evidence placed before it. Therefore, in my view, order of conviction cannot be set aside only on the basis of subsequent finding of the CEGAT. Nevertheless, in a given case, order of adjudication by CEGAT can certainly be a relevant circumstance in so far as the quantum of sentence is concerned.

14. The decision of the Division Bench of Goa Bench of this Court of will not help the Applicant. The scope of the proceeding before the Division Bench was completely different. The Division Bench was dealing with a challenge to an order of detention passed under the said Act of 1974. However, as rightly held by the Trial Court, the fact that the Applicant was detained for a period of about four months and more under the said order of preventive

detention will have a bearing on the question of sentence.

15. This takes me to another issue relating to the question of sentence. It will be necessary to refer to the Section 135 of the said Act. Section 135 of the said Act reads thus:

> "135. Evasion of duty or prohibitions.-((1) Without prejudice to any action may be taken under this Act, if any person-
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> (a) is in relation to any goods in any way knowingly concerned (in misdeclaration of value or) in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being force with respect to such goods, or
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> (b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purhcasing or in any other manner dealing with any goods which he knows or he has reason to believe are liable to confiscation under (section 11) or section 113, as the case may be, or),
>
> (c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113,)
>
> shall be punishable,-
>
> (i) in the case of an offence relating to any of the goods to which section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to (seven years) and with fine:

. Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than (three years);

(ii) in any other case with imprisonment for a term which may extend to (three years), or with fine, or with both.

(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

. Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than (one year).

(3) For the purposes of sub-section (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than (one year), namely-

(i) the fact that the accused has been convicted for the first time for reference under this Act;

(ii) the fact that in any proceeding under this Act, other than prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the

commission of the offence;

(iv) the age of the accused.)

A reference will have to be made to the judgment of the Trial Court as far as sentence is concerned. It is not in dispute that the notification under sub section (2) of section 123 of the Customs Act relating to the case in question was issued on 20th July, 1984 and that the said notification was issued after the seizure of the goods. The learned Magistrate relied upon decision of the Apex Court in AIR 1975 Supreme Court 2083 (Balumal Jamnadas Batra Vs. State of Maharashtra) and held that Section 123 (1) lays down a procedural rule in the context of the burden of proof and therefore, if the goods were subsequently notified when the Court deals with the Trial, the procedural rule will have to be applied. That is the reason why the learned Magistrate held that clause (i) of sub section 1 Section 135 of the Customs Act was applicable. The learned Magistrate, therefore, was of the view that clause (i) prescribes minimum punishment of three years which for special and adequate reasons to be recorded can be reduced to less than minimum period of three years. After considering the various facts such as detention of the Petitioner for about five months under the order of preventive detention,

the learned Magistrate held that the Applicant is entitled to the benefit of exception and he awarded rigorous imprisonment for a period of one year which is less than minimum.

16. As stated earlier, there is no dispute about the fact that notification under sub section (2) of Section 123 has been issued subsequent to the date of seizure. Thus, on the date of seizure, the goods were not at all notified under section 123 of the Customs Act. Therefore, it will be necessary to refer to the relevant decision of the Apex Court in the case of Balumal. In the case of Balumal, the seizure was effected on 21st April, 1967 and notification under section 123(2) was published in the Official Gazette on 26th August, 1967 and the prosecution was decided thereafter. Paragraph Nos.5 and 6 of the said decision are relevant:

> 5. It is true that lighters and flints were notified as provided in Section 123 (2) in the Official Gazette of 26-8-1967. Nevertheless, as the provisions of Section 123(1) of the Act only lay down a proceural rule, they could be applied when the case came up for trial before the Presidency Magistrate who actually decided it on 15-7-1969. Indeed, the complaint itself was filed on 30-10-1968. It is immaterial that the appellant was found in possession of goods on 21-4-1967.

> There is, however, another objection to the applicability of Section 123(1) of the Act. It is that it would apply only to goods seized under the Act. It is contended that the goods in respect of which the appellant was prosecuted were not seized under the Act. Reliance was placed for this contention upon Gian Chand Vs. State of Punjab, 1962 Supp (1) SCR 364 = (AIR 1962 SC 496 = 1962 (1) Cri. L.J. 485).
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> 6. Even if the goods with which we are concerned here were not seized under the Act, as provided by Section 111 of the Act, it is contended on behalf of the State that Section 106, read with Section 114 of the Evidence Act, was sufficient to enable the prosecution to ask the Court to presume that the appellant knew that the goods have been smuggled or imported in contravention of the law. The appellant had not produced evidence to show that the goods were legally brought.

17. It must be borne in mind that what has been confirmed by the Apex Court in the said decision is conviction under clause (ii) sub section 1 of section 135 and not the conviction under clause (i). It is a well settled proposition of law that a judgment is an authority for what it decides and not for what it follows from the judgment. On plain reading of paragraph No.5, all that the Apex Court has said is that as provision of section 123 lays down a procedural rule, the said procedural rule can be applied when the case comes up for trial before the Magistrate. Thus, the Apex Court had dealt with the applicability of the rule of procedure incorporated in

sub section (1) of Section 123. The Apex Court further held that even in a case where section 123 is not applicable, presumption could be raised under the relevant provisions of Indian Evidence Act. Section 123(1) incorporates purely a rule of procedure relating to burden of proof. All that the Apex Court held was that sub section 1 of section 123 being a rule of procedure, when notification under sub section 2 was issued prior to the commencement of the trial, the rule being procedural will apply to the trial which commenced after the date of notification. The decision of the Apex Court is based on well settled rule that an amendment to procedural enactment can apply to the pending proceedings. Sub-section 1 fo section 123 contains a rule of procedure which applies to the goods notified under sub section 2 of Section 123. It governs the rule of procedure in trial or adjudication. Clause (i) of sub section (1) of Section 135 prescribes a stringent punishment where the offence relates to goods to which section 123 applies. Clause (i) can be invoked when offence has been committed relating to the goods in respect of which there is a notification issued under sub-section (2) of Section 123. Offence under section 135(1)(b) is complete when a person acquires possession of any goods which he knows or has reason

to believe are liable for confiscation under section 113. Clauses (i) and (ii) of Section 135(1) prescribe sentence. Clause (i) provides for longer sentence for the goods which are notified under section 123 with a provision for minimum sentence. For the offence relating to goods which are not notified under section 123, a lesser punishment is prescribed by clause (ii). The question is when the offence was allegedly committed in the present case whether section 123 applied to the goods in question. While dealing with clause (i) of Section 135(1), the applicability of Section 123 cannot be considered in the context of procedural rule which governs articles which are notified under section 123. While considering the question whether clause (i) or (ii) of section 135(1) will apply, the only aspect which is to be seen is whether on the date of the offence, section 123 applied to the goods. When offence was committed, admittedly, the goods were not notified under sub section (2) of section 123 and the same were subsequently notified. If the contention of the prosecution is accepted, clause (i) of section 135(1) will have to be applied though on the date of commission of offence, there was no notification under sub section (2) of section 123. This will be clear viloation in article 20 of Constitution of India. The

Applicant had not committed an offence to which punishment prescribed under clause (i) of section 135(1) could have been imposed as on the date of commission of offence, the goods were not notified under Section 123(2). In my view, gross illegality has been committed by the learned Magistrate by convicting the Applicant under clause (i) of sub section (1) of section 135. As offence under section 135(1)(b) was established, clause (ii) which deals with all other cases where section 123 was not applicable to goods ought to have been applied. On plain reading of clause (ii), there is no minimum punishment prescribed. The punishment may extend to three years or fine or with both. The judgment of the learned Magistrate proceeds of erroneous assumption that minimum punishment was prescribed as he was of view that clause (i) of section 135(1) is applicable. Appellate Court has also not noticed this serious flaw in the judgment of the Trial Court. Therefore, the question of sentence will have to be considered in this perspective.

18. It is not in dispute that the Applicant suffered incarceration for about five months on the basis of order of detention which has been set aside by the Division Bench of this Court. The order of

detention was passed on the basis of the possession of the same goods by the Applicant. The subsequent order of Tribunal by which penalty imposed was set aside will have to be also considered as mitigating circumstances. The CGAT found that the exclusive possession of the tank area by the Applicant was not established. The offence has been committed around twenty two years ago. Quashing of the order of penalty by CGAT is a very important circumstance which will have to be considered. In the backdrop of this factual aspect, the question is whether after lapse of twenty two years, person can be made to suffer sentence of imprisonment. The order of preventive detention related to the same incident. The Division Bench has noted that basis for issuing the detention order was the seizure effected. In respect of the same seizure, there is a finding of the Tribunal holding that it cannot be said that the Applicant is the person who stored the goods. In my view, taking into consideration the facts and circumstances of the case, the Applicant cannot be made to suffer imprisonment after long lapse of twenty two years. The learned Magistrate had directed the Applicant to pay fine of Rs.3,000/-. As commission of offence is established and as the Applicant is not required to undergo any imprisonment, the amount of fine will have

to be enhanced. Considering the facts and circumstances of the case, the fine amount will have to be enhanced to Rs.25,000/-. Hence, I pass the following order:

: O R D E R :

i) The conviction of the Applicant is confirmed.

ii) The order of sentence is set aside and the Applicant is directed to pay fine of Rs.25,000/- (Rupees Twenty Five Thousand) within a period of four months. In default in payment of fine within stipulated period of four months, the Applicant will have to undergo rigorous imprisonment for four months.

iii) Revision Application is partly allowed in above terms with no orders as to costs.

JUDGE